Canterbury Asia Sdn Bhd v Dato' Wira Aminudin bin Embi & 11 Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-04(NCVC)(W)-347–11 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
18 MAY 2016

Limitation — Acknowledgment — Debt — Acknowledgment of debt by appellant through Malaysia Rugby Union financial statements — Whether acknowledgment valid — Whether acknowledgment unequivocal — Whether acknowledgment extended limitation period — Limitation Act 1953 s 27

Unincorporated Associations — Office bearers — Liability of respondents as office bearers — Appellant supplied rugby items to council members of Malaysia Rugby Union ('MRU') — Council members defaulted payment — Appellant claimed liability against council members — Whether council members personally liable for claim — Whether council members proper parties who can sue and be sued on behalf of MRU — Sports Development Act 1997 s 40

The appellant supplied rugby jerseys, shorts, kits and other paraphernalia to the Malaysia Rugby Union ('MRU') between the periods of 30 November 2004–29 May 2009. Due to the default in payment by the MRU, the appellant had brought an action at the magistrates' court against all the respondents personally as the council members of the MRU. The magistrates' court allowed the claim in part and dismissed the appellant's claim of RM7,510 for goods delivered in 2004 for being time-barred. On appeal, the learned High Court judge reversed the magistrate's decision and held that the respondents could not be made liable and that the defence of limitation was not available to the respondents. Hence, the present appeal. The main issue for determination was whether or not the 12 respondents being the current council members of MRU were liable to pay the liability of MRU in the form of claims for outstanding due to the appellant.

Held, allowing the appeal with costs, setting aside the order of the High Court and reinstating the order of the magistrates' court:

(1) MRU is a sports body registered under the Sports Development Act 1997 ('the Act'). Unlike a registered society under the Societies Act 1966, a sports body under the Act is not given the status of a legal body that can sue and be sued. In the present case, the 12 respondents being elected

council members were obliged to oversee the management of MRU. In the administration of an association, the council members as the governing body should ensure that the indebtedness of the association be attended to since the purchase made in this case were purely for the use of its members (see paras 21–22).

(2) Section 40 of the Act has no application to the facts of this case. It is clear that s 40 of the Act was legislated to give protection from any legal suit for anything done in good faith, to a person who is appointed by the Minister under the Act. In this case, the respondents were the elected members of the MRU and were not persons appointed by the Minister under the Act and therefore could not seek protection under it (see para 26).

(3) Limitation had set in when the invoices relating to the sum of RM7,510 were all dated in the year 2004 when the claim was filed in 2013. The court disagreed with the contention of the appellant that there was acknowledgment of debt which had extended the limitation period. Based on the facts, there was no acknowledgment of debt through the annual financial statement because there was no clear acknowledgment of the same in the said statement. Section 27(1) of the Limitation Act 1953 requires every acknowledgment to be in writing and signed by the person making the acknowledgment. Further, there was no unequivocal acknowledgment as required under the same section as evidence of acknowledgment. For all the reasons, the respondents were therefore liable to the claim made by the appellant (see paras 28–32).

[Bahasa Malaysia summary

Perayu membekalkan jersi ragbi, seluar pendek, alat dan barangan lain kepada Kesatuan Ragbi Malaysia ('KRM') di antara tempoh 30 November 2004–29 Mei 2009. Akibat keingkaran bayaran oleh KRM, perayu telah memulakan tindakan di mahkamah majistret terhadap kesemua responden-responden secara peribadi sebagai ahli majlis KRM. Mahkamah majistret membenarkan sebahagian tuntutan dan menolak tuntutan perayu sebanyak RM7,510 bagi barangan yang dihantar pada tahun 2004 kerana dihalang masa. Atas rayuan, hakim Mahkamah Tinggi yang bijaksana mengakas keputusan majistret dan memutuskan bahawa responden-responden tidak boleh bertanggungjawab dan bahawa pembelaan had masa boleh diguna pakai oleh responden-responden. Maka, rayuan ini. Isu utama bagi penentuan adalah sama ada atau tidak 12 responden sebagai Ahli Majlis KRM pada masa ini bertanggungjawab untuk membayar liabiliti KRM dalam bentuk tuntutan untuk jumlah tertunggak yang perlu dibayar kepada perayu.

Diputuskan, membenarkan rayuan dengan kos, mengetepikan perintah Mahkamah Tinggi dan mengembalikan semula perintah mahkamah majistret:

A (1) KRM adalah badan sukan yang didaftarkan di bawah Akta Pembangunan Sukan 1997 ('Akta'). Tidak seperti persatuan yang didaftar di bawah Akta Pertubuhan 1966, badan sukan di bawah Akta tidak diberi status badan undang-undang yang boleh menyaman dan disaman. Dalam kes ini, 12 responden tersebut sebagai ahli majlis yang dilantik B adalah bertanggungjawab untuk menyelia pengurusan KRM. Dalam pentadbiran sesuatu persatuan, ahli majlis sebagai badan yang mengawal patut memastikan bahawa keberhutangan persatuan diuruskan memandangkan pembelian yang dibuat dalam kes ini adalah semata-mata bagi kegunaan untuk ahli-ahlinya (lihat perenggan 21–22). C

(2) Seksyen 40 Akta tidak terpakai kepada fakta kes ini. Adalah jelas bahawa s 40 Akta digubal untuk memberi perlindungan daripada mana-mana tindakan undang-undang bagi apa-apa yang dibuat dengan suci hati, kepada seseorang yang dilantik oleh Menteri di bawah Akta tersebut. D Dalam kes ini, responden-responden adalah ahli-ahli KRM yang dilantik dan bukan orang-orang yang dilantik oleh Menteri di bawah Akta dan oleh itu tidak dapat memohon untuk perlindungan di bawahnya (lihat perenggan 26).

E (3) Had masa telah set in apabila invois-invois berkaitan kepada jumlah RM7,510 kesemuanya bertarikh 2004 apabila tuntutan difailkan pada tahun 2013. Mahkamah tidak bersetuju dengan hujahan perayu bahawa terdapat pengakuan hutang yang telah melanjutkan tempoh had masa. Berdasarkan fakta, tidak terdapat pengakuan hutang melalui pernyataan F kewangan tahunan kerana tidak terdapat pengakuan jelas terhadapnya dalam pernyataan tersebut. Seksyen 27(1) Akta Had Masa 1953 mengkehendaki setiap pengakuan dibuat secara bertulis dan ditandatangani oleh orang yang membuat pengakuan. Selanjutnya, tidak terdapat pengakuan jelas seperti yang dikehendaki di bawah seksyen yang G sama sebagai bukti pengakuan. Atas kesemua alasan, responden-responden oleh itu bertanggungjawab kepada tuntutan yang dibuat oleh perayu (lihat perenggan 28–32).]

Notes

H For cases on debt, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2258–2265.

Cases referred to

Chin Mee Keong & Ors v Pesuruhjaya Sukan [2007] 6 MLJ 193, CA (folld)
I *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204, FC (refd)
Sanderson v Blyth Theatre Company [1903] 2 KB 533, CA (refd)
Yee Weng Kai v Yam Kong Seng & Anor [2013] 2 MLJ 575, CA (refd)

Legislation referred to

Limitation Act 1953 s 27, 27(1)
Societies Act 1966
Sports Development Act 1997 ss 18, 40

Appeal from: Appeal No 11BNCVC-23–02 of 2014 (High Court, Kuala Lumpur)

K Lopez (Kamarudin & Partners) for the appellant.
Darshan Singh Ulakh (Jaswant Kaur with him) (Darshan & Jaswant) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This is an appeal by Canterbury Asia Sdn Bhd against the decision of the High Court at Kuala Lumpur given on 19 August 2014 which had overruled the decision of the learned magistrate.

[2] After hearing the submissions of parties on 24 November 2015, we allowed the appeal. We reinstated the decision of the learned magistrate and set aside the order of the High Court. We will refer to the parties as how they were referred to at the magistrates' court.

BACKGROUND FACTS

[3] The plaintiff was at the material time an authorised distributor of 'Canterbury' of New Zealand brand of rugby jerseys, shorts, kits and other paraphernalia and was operating its business in Malaysia. The plaintiff had supplied these items to the Malaysia Rugby Union, a sports body registered under the Sports Development Act 1997.

[4] The defendants were all the past and current council members of the Malaysia Rugby Union ('MRU') and had served as council members at different period in time as follows:

(a) the first to 13th defendants – from the year 2010–2013;

(b) the 14th to 20th defendants together with the sixth, eighth, ninth and 12th – from the year 2007–2010; and

(c) the 21st to 25th defendants together with the sixth, eighth, 12th, 14th, 15th and 19th defendants – from the year 2004–2007.

The 26th defendant is MRU which is an unincorporated sports association registered under the Sports Development Act 1997.

[5] MRU had ordered from the plaintiff, to supply them with rugby kits and other goods for the purpose of the Malaysian Rugby Team between the periods of 30 November 2004–29 May 2009. The invoices, delivery notes and quotations for the goods are found at pp 355–374 of the appeal record in Part C. The plaintiff had also supplied MRU with a CCC (Canterbury) A-Board ('advertisement board') for rugby tournaments. The said board was said to have been damaged while in the custody of MRU. The invoices issued for the damaged CCC (Canterbury) A-Board is found at p 375 of the appeal record in Part C.

[6] At the magistrates' court the plaintiff had claimed for a sum of RM45,561 for the goods sold and delivered, plus RM3,000 for damages caused to the CCC A-Board whilst in the custody of MRU. The plaintiff's claim for RM48,561 is against all the 25 defendants personally, for the goods sold and delivered to MRU between the years 2003 and 2009. Each of the defendants had been on the MRU Council Members at different times during the period of 2003–2009 including the 12 defendants. The 12 defendants in this appeal were in fact the serving council members at the time the writ of summons was filed in 2013. Alternatively, the plaintiff claimed for the sum of RM7,510 only from the sixth, eighth, 12th, 14th, 15th, 19th, 21st, 22nd, 23rd, 24th and 25th defendants because the goods were sold and delivered in the year 2004 when these defendants were council members (see p 42 of the appeal record (Part A)).

[7] After filing the claim, the plaintiff had later on, amended its statement of claim to bring in MRU as the 26th defendant. The writ of summons and the statement of claim was served on MRU, without naming any official to represent it. No appearance was filed by the 26th defendant as the writ of summons and statement of claim was not served on any of its official. The plaintiff then proceeded to obtain a judgment in default of appearance ('JID') against the 26th defendant on 10 January 2014. The JID was later set aside on the ground that the 26th defendant was not properly served.

FINDINGS OF THE MAGISTRATES' COURT

[8] After a full trial the learned magistrate held that the 12 defendants by virtue of being the current council members are personally liable for the claim made by the plaintiff arising from the indebtedness of the 26th defendant. The learned magistrate on evidence, was satisfied that MRU was, is and continued to be indebted to the plaintiff and that the debt remained unpaid. The learned magistrate also held that MRU as an incorporated sports association, cannot be sued in its own name and the 12 defendants as the present council members of MRU are the proper parties who can sue and be sued in court on behalf of MRU.

[9] The learned magistrate further found that the current council members are liable to pay the plaintiff but not the previous council members since the present council members are the ones who have the control over MRU and not the previous council members. The previous according to the learned magistrate would not have any more access to the administration of MRU.

[10] The learned magistrate then allowed part of the plaintiff's claim in the sum of RM41,051 (out of the total claim of RM48,561) together with interest and costs against all the 12 defendants. The balance of the plaintiff's claim of RM7,510 for goods delivered in 2004, was however dismissed by the learned magistrate for being time-barred.

[11] The plaintiff's claim for a Sanderson order for the defendants to bear the costs payable by the plaintiff to the 17th, 18th, 20th and 24th defendants, (some of the previous council members of MRU) who had contested the plaintiff's claim at the trial was dismissed by the learned magistrate. The 12 defendants appealed against the order of the magistrate to the High Court and the plaintiff cross-appealed against the decision of the magistrate, in dismissing part of the claim for reason of time-barred.

FINDINGS OF THE HIGH COURT

[12] At the High Court the learned High Court judge Dato' Nik Hasmat bt Nik Mohamad had reversed the magistrates' decision and accepted the defendants' counsel's submission that the 12 defendants being present council members of MRU cannot be made liable for the debt due to the plaintiff from MRU. The learned High Court judge however allowed the plaintiff's cross-appeal and held that the defence of limitation was not available to the defendants because there was valid acknowledgement by MRU of the total debt of RM48,561 due from the defendants to the plaintiff in its financial audited account tabled at MRU Annual General Meetings. The documents which was said to have acknowledged the debt in writing is the MRU financial statements of 31 December 2011 (pp 381–387 of the appeal record (Part C) marked as exh P7). This financial statement was confirmed by the Honorary Treasurer, the ninth defendant who testified as SD5.

[13] The learned High Court judge however affirmed that part of the decision of the learned magistrate who had dismissed the plaintiff's claim for a Sanderson order.

[14] Leave was obtained by the defendants from this court on 30 October 2014 to lodge this appeal. The plaintiff had also cross appealed on the finding made by the learned High Court judge that the defence of limitation was not available to the defendants for the sum of RM7,510 as well, as costs.

[15] There was no written grounds of judgment by the learned High Court judge and we had to proceed to hear the appeal without the benefit of Her Ladyship's grounds of judgment.

[16] The appeal came before us on 24 November 2015 which we heard and allowed. We set aside the order of the High Court and we affirmed the decision of the learned magistrate.

GROUNDS OF APPEAL

[17] Before us, learned plaintiff's counsel raised several grounds of appeal as listed under the following headings:

(a) whether it is the defendants as the present office bearers/council members of MRU who are liable to pay for the debt due to the appellant/plaintiff from MRU or must MRU itself pay the debt to the appellant/plaintiff;

(b) whether an unincorporated association like MRU can sue or be sued in the name of MRU or must the action be brought by or against the office bearers in their own name but representing their unincorporated association;

(c) whether the defence of limitation was not available to the respondents/defendants because there was valid acknowledgment by MRU; and

(d) whether a Sanderson order can be ordered for the respondents/defendants to bear the costs payable by the appellant/plaintiff to the 17th, 18th, 20th and 24th defendants in the Kuala Lumpur Magistrates' Court action.

[18] Having heard the submission of parties, in our view the main issue requiring our determination is whether or not the 12 defendants being the current council members of MRU are liable to pay the liability of MRU in the form of claims for outstanding due to the plaintiff.

[19] First we noted that the defence of the defendants, was to dispute the debt incurred by MRU but at trial it was abandoned. In the written submission of counsel of the defendants before the High Court it was admitted that the MRU did make orders for the goods. The only issue they had, was who was to pay for these goods. The amount claimed by the plaintiff was in fact not in dispute during the trial. The dispute only being on the issue of whether the defendants being the present council members can be made liable personally to pay the debt of MRU.

[20] Secondly we also noted that the order of the High Court is highly inconsistent. Her Ladyship had allowed the cross-appeal on the amount of RM7,510 found to be barred by limitation by the magistrates' court. The learned High Court judge found liability against the 12 defendants for this sum despite her finding that they are not personally liable to the indebtedness of MRU.

OUR DECISION

[21] MRU is a sports body registered under the Sports Development Act 1997. Unlike a registered society under the Societies Act 1966, a sports body under the Sports Development Act 1997 is not given the status of a legal body that can sue and be sued. This issue was deliberated and referred to by this court in *Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193. In that case the Malaysia Taekwando Association which was a registered sports body under s 18 of the Sports Development Act 1997, sought for leave to apply for a judicial review. The court speaking through James Foong JCA (as His Lordship then was) held that an association cannot sue in its own name. His Lordship remarked that preferably it should sue through its registered public office, otherwise it is permissible for any office bearer of the association to sue on its behalf. The Federal Court case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 was referred to in *Chin Mee Keong*. Having taking into account of the Federal Court decision, the Court of Appeal in that case concluded that it is permissible for any of the office bearer of the association to mount a claim on behalf of its members.

[22] We are in agreement with the legal proposition in *Chin Mee Keong*. In our view, the 12 defendants being elected council members are obliged to oversee the management of MRU. It is for this reason that the council members or the committee of an association, being the governing body is legally empowered with the capacity to sue on behalf of an association. In that same light, in the administration of an association the council members as the governing body in this case should ensure that the indebtedness of the association be attended to since the purchases made in this case were purely for the use of its members.

[23] The defendants have knowingly offered themselves to be elected to become the council members of MRU knowing the financial state of affairs, including the debts due to the plaintiff which will have to be paid. The defendants did not plead nor contended that they took over on the condition that they will not be liable for the outstanding debts. The evidence before the learned magistrate, in fact shows that they acknowledged that the debt was outstanding albeit a legacy item and that there was no sufficient funds to pay.

[24] The defendants being the current council members are the only ones who have the power, control and authority over MRU at the material time. They could have caused the funds of MRU to be used to pay the debt due to the plaintiff. The defendants however refused or failed to do so. And neither did the defendants being the current council members provide any solution to resolve the debt owing. They are now merely disputing on who is liable to pay the outstanding, debt although they have not originally pleaded their case in that way.

[25] It was raised in the submission of learned counsel for the plaintiff that s 40 of the Sports Development Act 1997 was referred to by the learned High Court judge during the appeal before her, on her own volition. After referring to s 40 the learned judge found that provision of the law protects the defendants as council members from the liability claimed by the plaintiff. Resulting from this the defendants in the current appeal raised the issue on the application of s 40 though it was never the case of the defendants at the trial that they were sheltered by s 40.

[26] Without getting into the discourse of the parties on this issue we are satisfied that s 40 has no application to the facts of this case. It is clear that s 40 was legislated to give protection from any legal suit for anything done in good faith, to a person who is appointed by the Minister under the Sports Development Act 1997. The defendants here are elected members of the MRU and are not persons appointed by the Minister under the Act as envisaged by s 40 and therefore cannot seek protection under it. If that was the rationale of the finding by the learned High Court judge, we are in agreement with learned counsel for the plaintiff that the learned High Court judge had erred in her application of s 40. We say so, because as we have stated earlier we do not have the benefit of her grounds of judgment and we are not clear as to Her Ladyship's finding on the same.

[27] We further find it strange that the learned High Court judge had allowed the cross-claim. Her Ladyship had held that the defendants would be liable to pay RM7,510 as it was not barred by limitation, when in the first place Her Ladyship had found that the defendants should not be made personally liable for debt of MRU. We however agreed with the finding of the learned magistrate that the part of the claim, in the sum of RM7,510 are statute barred as the invoices in question were all dated in the year 2004.

[28] Learned counsel for the plaintiff contended that there was acknowledgement of this debt by virtue of the statement in the financial account of MRU up to the year 2013. We do not agree with the contention of learned counsel that there was any acknowledgment of debt which had extended the limitation period. We agree with the finding of the learned

magistrate that limitation had set in when the invoices relating to the sum of RM7,510 were all dated in the year 2004 when the claim was filed in 2013. On the facts of this appeal, we agree with the learned magistrate there was no acknowledgement of this debt, as required under the Limitation Act 1953.

[29] We further do not agree with learned plaintiff's counsel that there was any acknowledgment of debt through the annual financial statement because there was no clear acknowledgement of the same in the said statement. Section 27(1) of the Limitation Act 1953 requires every acknowledgment to be in writing and signed by the person making the acknowledgment.

[30] In *Yee Weng Kai v Yam Kong Seng & Anor* [2013] 2 MLJ 575, the Court of Appeal held that the acknowledgment of debt must be an unequivocal acknowledgement and in writing. An sms message was found to be no acknowledgment as required under s 27 of the Limitation Act 1953 in the case. We have also perused through the financial statement alluded to by the appellant in this case. We do not find such unequivocal acknowledgment as required under s 27, as evidence of acknowledgment. We find the High Court was in error in intervening with this finding by the learned magistrate.

[31] On the issue of costs, we find no appealable error made by the learned magistrates' court. Costs being discretion of the trial judge, cannot be disturbed for no apparent reason. We do not find any good reason to interfere with the same.

[32] For all the above reasons we agree with the submissions of learned counsel for the plaintiff that the defendants are to be held liable to the claim made by the plaintiff. We therefore allowed the appeal with costs and set aside the order made by the High Court. The decision of the learned magistrate is reinstated.

[33] In the result, we therefore allow the appeal with costs. The order of the High Court was set aside and we reinstated the order of the magistrates' court.

Appeal allowed with costs; order of High Court set aside and order of magistrates' court reinstated.

Reported by Dzulqarnain Ab Fatar